Case Number:	Civil Appeal 10 of 2017
Date Delivered:	21 Dec 2017
Case Class:	Civil
Court:	High Court at Narok
Case Action:	Judgment
Judge:	Justus Momanyi Bwonwong'a
Citation:	Rural Electrification Authority v Shashon Ole Leuka [2017] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Narok
Docket Number:	-
History Docket Number:	Civil Suit 131 of 2015,
Case Outcome:	Appeal dismissed
History County:	Narok
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO. 10 OF 2017

RURAL ELECTRIFICATION AUTHORITY.....APPELLANT

-VERSUS-

SHASHON OLE LEUKA.....RESPONDENT

(Being an appeal from the original judgement and decree dated 21/2/2017 in the Chief Magistrate's court at Narok in Civil Suit No. 131 of 2015, Shashon Ole Leuka v. Rural Electrification Authority)

JUDGEMENT

INTRODUCTION

1. The appellant has appealed against both liability and quantum in the sum of Ksh.1,881,410/-, which were awarded in favour of the respondent/plaintiff.

2. The respondent has opposed the entire appeal and has urged the court to dismiss the appeal in its entirety with costs.

3. The judgement and decree are based on the direct evidence of the respondent/plaintiff [PW 1] who was the only witness.

THE CASE FOR THE APPELLANT

4. The appellant called only one witness namely Douglas Nyagani Torigi [DW 1].

5. The appellant has raised 5 ground of appeal in his memorandum of appeal to this court. In ground 1, the appellant has faulted the trial court both in law and fact in failing to find that the liability in the matter was not proved against the appellant at 80%. Additionally, the appellant states that the trial court in apportioning 80% liability to its driver, the court exercised its discretion wrongly in the absence of supporting evidence.

THE CASE FOR THE RESPONDENT

6. Douglas Nyagani Torigi (DW1) testified on behalf of the appellant. He testified that he worked for the Rural Electrification Authority as a design technician. It was his testimony that he was a licensed driver. It was also his testimony that at the time of the accident, he was driving uphill at a slow speed. He adopted as his evidence his witness statement that was filed in court in 8/9/2015. According to his witness statement, he was driving at a speed of around 30 kph. In respect of the condition of that road, he testified that it had sharp corners, meanders and was very rough. He also testified that he drove at a low speed, because he was new to that road. He continued to testify that upon approaching Entasekira, he saw a motor cycle towards his side which was driven at a very high speed. He attempted to avoid the accident, but the motor cycle hit his vehicle notwithstanding his hooting to the motorcyclist as a warning. He then took the motor cyclist and his pillion passenger to the nearby health centre. Finally, he stated that his motor vehicle was inspected and found to have no pre-accident defects. He totally blamed the motor cyclist for this accident.

7. In this regard, the respondent/plaintiff testified that the accident occurred on 26/6/2016. It was his testimony that he was riding a motor cycle to Entasikira, while the appellant's driver was driving his motor vehicle registration No. KBR 931U from the opposite direction heading for Olorte. He further testified that he was on the left side of that road as one faces Entasikira and that he was going downhill.

8. Furthermore, it was also his evidence that the appellant's driver drove his motor vehicle at a speed. As a result, he tried to swerve to avoid it. In doing so, both the appellant and the respondent/plaintiff landed in a ditch. He further testified that the appellant's/defendant's driver was to blame for the accident since he drove on the respondent/plaintiff's side of the road. As a result of the accident, he sustained a number of injuries from which he has not fully healed. Additionally, he also testified that he now uses clutches and is unable to go to work. As a result of this accident, the respondent fell off the road into the ditch.

ON LIABILITY

9. The trial court was faced with these conflicting versions as to how the accident occurred. On the basis of the evidence produced before the trial court, that court directed its mind as to the question of who was to be blamed for the accident. It believed the evidence of the respondent/plaintiff that he was driving on his correct side of the road. It did not believe the evidence of the appellant's driver that he was driving on his correct side of the road. The trial court found the evidence of the appellant's driver to be contradictory. The evidence of the appellant's driver initially was that he was driving on the left hand side and then proceeded to contradict himself that he was driving on the right side. The court also found that it was unlikely that the appellant's driver was driving in his correct side of the road because "he landed in a ditch to the right side of the road." I therefore find that there was credible evidence of the respondent /plaintiff that the appellant's driver was to blame for the accident. According to the appellant's driver, he was driving uphill at 30 kph. There is also evidence that his motor vehicle had no pre-accident defects including the brakes. I therefore find that he drove on the wrong side of the road and was responsible for the accident. The reason being that there was no reason as to why he did not apply his brakes to stop immediately upon sensing danger. This is more so in the light of the condition of that road which according to his evidence was rough and had meanders and corners.

10. Furthermore, the appellant's driver testified that his motor vehicle and the motor cycle of the respondent/plaintiff could have by-passed each other. The totality of that evidence clearly show that the appellant's driver was to blame for the accident.

11. The issue for consideration is whether the respondent/plaintiff contributed to the accident. It was his evidence that he fell off the road from his motor cycle, although he was driving on his left side of the road.

12. Furthermore, there is evidence that although the road was narrow, both the appellant's motor vehicle and the motor cycle would have by-passed each other safely. This is clear from the evidence of the appellant's driver under cross-examination. The appellant's driver while under re-examination further testified that his motor vehicle moved to the ditch by reversing. There is also evidence that the motor vehicle did not have any pre-accident defects. Furthermore, under cross-examination, the appellant's driver testified that "I braked but at 30 kph I could have stopped immediately. My statement did not say so. I was not familiar with the road. 30 kph is not fast. I landed in a ditch. The one on my right. I did not get into his lane. It's the impact of the motor vehicle that caused me to land in the ditch."

13. In the light of the above evidence and that of the respondent, I find that the appellant's driver was totally to blame for the accident. He drove on the right side of the respondent's side. Furthermore, nothing stopped him from applying his brakes and stopping his motor vehicle. Additionally, he landed in the ditch which was on the correct side of the respondent. It is therefore crystal clear that the appellant's driver was driving at an excessively high speed in the circumstances of this case. It is equally clear that he did not keep a proper look out given that this road was rough and had meanders. I therefore set aside the finding of the trial court that the respondent was 20% blame worthy.

14. In ground 2, the appellant has faulted the trial court for apportioning negligence to its driver to the extent of 80%. I have already dealt with this issue in ground 1. This ground lacks merit and is hereby dismissed.

15. In ground 3, the appellant has faulted the trial court in entering judgement on a liability against the appellant when the respondent did not prove his case on a balance of probability to warrant the award of damages. In this regard, the trial court found as a fact that "considering he had seen the motor cycle long before the accident, he must bear the greater responsibility. On the other hand, the motor cycle could have stopped dead when he saw the vehicle come at high speed." This finding is not supported by the evidence produced in the trial court. On the contrary, the evidence shows that the appellant's driver was totally to blame for the accident. I therefore set aside this finding of the trial court. I therefore find no merit in this ground of appeal and is hereby dismissed.

16. In ground 4, the appellant has faulted the trial court in law and fact in failing to consider the evidence tendered, the relevant authorities and the submissions filed by the appellant. In this regard, the trial court as I have indicated, considered the entire

evidence and apportioned liability. It then proceeded to consider the authorities in respect of the award of general damages. After doing so, the court found that the authorities cited by the respondent were more reliable. It then blamed the respondent to the extent of 20% and proceeded to enter judgement for the respondent in the sum of Ksh.1,881,440/=. In view of this finding, I find that the trial court actually considered the authorities cited by the appellant and his submissions. I therefore find no merit in this ground of appeal and is hereby dismissed.

17. In ground 5, the appellant has faulted the trial court for entering judgement in favour of the respondent which was against the law and weight of the evidence adduced in court. The appellant has therefore urged this court to interfere with the finding of fact of the magisterial court. In this regard, the evidence shows that the appellant's driver landed in a ditch on the right side of the road. This was the correct side of the respondent. The appellant's evidence in this regard is that his motor vehicle was going uphill and that it moved to the ditch by reversing. It is clear from this evidence that he lost control of his vehicle. This is more so given the fact that this motor vehicle did not have any pre-accident defects. The brakes of the motor vehicle were in perfect condition. It follows from this condition of the motor vehicle that nothing stopped him from applying his brakes in an effort to control the motor vehicle. He further testified under cross-examination that after the accident he got confused. In the circumstances, the apportionment of liability of the appellant's driver being negligent to the extent of 80% and that of the respondent being 20% is unmerited. It therefore follows that the apportionment of liability by the trial court is not supported by the evidence. I therefore reject the submission of counsel for the appellant in this regard. I have reassessed the entire evidence as required of a first appeal court, according to *Selle & Another v. Associated Motor Boat Company Limited & Others [1968] EA 123 at page 126, in which Sir Clement De Lestang VP,* opined as follows;

" ……...An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound to follow the trial judge's finding of fact if it appears either that he clearly failed on some point to take account of particulars circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally. (Abdul Hameed Saif v. Ali Mohamed Sholani (1955) 22 EACA 270)….."

18. Counsel for the appellant relied on the following authorities. Furthermore, in the English case of *Watt v. Thomas (1947) EA 485*, in which the court therein expressed its as follows;

"……an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but his jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide.……...."

"……..But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight.…..…"

19. Finally in *Palace Investments Ltd v. Geoffrey Kariuki Mwenda and Another NRB CA Civil Appeal No. 127 of 2007 [2007] eKLR,* the Court of Appeal adopted the dictum of Denning J., in *Miller v. Minister of Pensions [1947]2 All ER* 372 in which the burden of proof was stated as follows;

"…..…...That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', then burden is discharged, but if the probabilities are equal, it is not ……..…"

"……..Thus, proof of a balance or preponderance of probabilities means a win, however, narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.….."

Counsel for the respondent relying on *Butt v. Khan (1981) KLR 349* in which *Law, J. A.* laid out the principles upon which an

appellate will disturb an award of damages. He expressed himself as follows: *" An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on the wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."*

20. Furthermore, in assessing the liability of the parties, I am required according to *Isabella Wanjiru Karanja v. Washington Malele (1983 eKLR*, to bear in mind that two elements are involved, namely causation and blameworthy. I have done so in the course of re-evaluating the evidence tendered at trial. I find that it is the appellant's driver who caused the accident and is 100% to blame for the accident.

21. <u>On quantum</u>

The trial court considered the authorities cited by counsel in respect of quantum of damages. The authorities cited by the appellant and his submissions in this court clearly indicate that the assessment of damages is in the discretion of the trial court.

22. Furthermore, this court may interfere with the amount of damages awarded if the amount is so inordinately low or manifestly high that it represents an entirely erroneous estimate in the light of the injuries sustained by the respondent. The respondent suffered a fracture of the right femur, a fracture of the left tibia and contunsions of the chest. The appellant will still need care in the future. In this regard, the trial court took into account the injuries sustained by the respondent and the comparable quantum of damages awarded by the authorities cited in that court. Having done so, the court awarded Sh.1,881,440/- after offsetting 20% contributory negligence. In view of my finding that the appellant is totally to blame for the accident, I hereby set aside the award of Shs.1,881,440/=. In its place I hereby enter judgement for the respondent in the sum of Sh.2.351,800/= with costs of this appeal.

23. In the light of the foregoing, the appellant's appeal fails and is hereby dismissed in its entirety.

Judgement delivered in open court this 21st day of December, 2017 in the absence of both appellant and respondent.

J. M. Bwonwonga

Judge

21/12/2017